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No. 05-1074

In the Supreme Court of the United States

LILLY M. LEDBETTER, PETITIONER

v.

GOODYEAR TIRE AND RUBBER COMPANY, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether or under what circumstances a plaintiff may bring an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, alleging illegal pay discrimination when the allegedly disparate pay is received during the statutory limitations period, but is the result of intentionally discriminatory pay decisions that occurred outside the limitations period.

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This case presents the question whether or under what circumstances a plaintiff may bring an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, alleging illegal pay discrimination when the allegedly disparate pay is received during the statutory limitations period, but is the result of intentionally discriminatory pay decisions that occurred outside the limitations period. The United States has a significant interest in the resolution of that question. The Attorney General enforces Title VII against public employers, and the Equal Employment Opportunity Commission (EEOC) enforces Title VII against private employers. In addition, Title VII applies to the federal government as an employer. See 42 U.S.C. 2000e-16. The United States, as the principal enforcer of the civil rights laws and the Nation's largest employer, has a strong interest in the proper enforcement of Title VII.

STATEMENT

1. Title VII makes it an "unlawful employment practice" for an employer "to discriminate against any individual with respect to his compensation * * * because of such individual's * * * sex." 42 U.S.C. 2000e-2(a)(1). In general, a Title VII plaintiff must file a charge with the EEOC within 180 days "after the alleged unlawful practice occurred." 42 U.S.C. 2000e-5(e)(1). In States that have an administrative agency with authority to remedy practices prohibited by Title VII, a plaintiff who initially proceeds before that agency must file a charge with the EEOC within 300 days "after the alleged unlawful practice occurred" or within 30 days of when the plaintiff received notification that agency proceedings have been terminated, whichever is earlier. *Ibid.* The State in which this action arose, Alabama, does not have such an agency. Pet. App. 15a. Accordingly, charges in that State are subject to the 180-day limitations period.

2. In February 1979, respondent Goodyear Tire and Rubber Company hired petitioner Lilly Ledbetter to work in its Gadsden, Alabama, tire plant. Pet. App. 5a. Petitioner was classified as a "Supervisor," a precursor to the position later known as "Area Manager." *Ibid.* In the early 1980s, respondent established a system for awarding its Gadsden plant managers annual merit pay raises. *Id.* at 4a. Under that system, the Area Manager's direct supervisor recommended salary increases at the beginning of each calendar year based primarily on an employee's most recent performance ranking. *Ibid.*

The record contains little information on petitioner's performance ranking or her pay raises for the first 12 years that she worked for respondent. Pet. App. 5a. The record does contain such information for the years after that. In

1993, petitioner received a 5.28% raise based on a performance ranking of third out of four Area Managers. *Id.* at 6a. In 1994, petitioner received a 5% raise based on a performance ranking of last. *Ibid.* In 1995, petitioner received both an "individual performance award" and a "top performance award," resulting in a 7.85% raise. *Id.* at 5a-6a. The record does not contain the performance ranking on which that raise was based, but respondent's compensation guidelines reserve such a dual award for employees who achieve the highest level of performance. *Id.* at 6a. In 1996, petitioner was not eligible for a raise because of the timing of her previous raise, but she was ranked fifteenth out of the 16 Area Managers in the performance rankings on which the 1996 raises were based. *Ibid.*

At the end of 1996, petitioner's supervisor did not prepare an evaluation for petitioner because, based on her low ranking from the previous year, she was going to be included in the plant's scheduled layoffs. Pet. App. 7a. Rather than laying her off, however, respondent retained petitioner at her existing salary to serve as a substitute for Area Managers on extended leave. *Id.* at 7a-8a. By the end of 1997, petitioner was making 15% less than the lowest paid male Area Manager and 40% less than the highest paid male Area Manager. *Id.* at 8a.

At the urging of her supervisor, petitioner transferred to a non-supervisory position in January 1998. Pet. App. 8a. Petitioner's performance ranking for the year before her transfer was fifteenth out of 16 Area Managers. *Id.* at 9a. As a result, petitioner did not receive a raise in 1998. *Ibid.*

In March 1998, petitioner filed a completed questionnaire with the EEOC, alleging that she was forced to transfer to a non-supervisory position because of her sex and that she had been subjected to discrimination in her new department. Pet. App. 9a. In July 1998, petitioner filed a

formal charge with the EEOC, reiterating the claims in her questionnaire and adding a claim that she had received less pay than other Area Managers on the basis of her sex. *Ibid.* In November 1998, petitioner accepted respondent's early retirement offer. *Ibid.*

3. In November 1999, petitioner filed suit against respondent in federal district court alleging, *inter alia*, that throughout her 19-year career, respondent had given her disparate pay on the basis of her sex, in violation of Title VII and other provisions. Pet. App. 10a. After a jury trial, the jury found that it was "more likely than not that [respondent] paid [petitioner] an unequal salary because of her sex." *Id.* at 11a. The jury awarded petitioner $223,776 in backpay, $4662 for mental anguish, and $3,285,979 in punitive damages. *Ibid.*

In post-trial proceedings, respondent sought judgment as a matter of law, arguing that Title VII's 180-day limitations period precluded petitioner from challenging the annual merit raise decisions that occurred outside the 180-day period and that there was insufficient evidence to support a jury finding of intentional pay discrimination with respect to the pay decision that occurred within that period. Pet. App. 11a. The district court denied respondent's motion, explaining only that the jury could have found that, but for her sex, petitioner would have received the same pay through November 1998 as an Area Manager who was paid the same as petitioner when she began working for respondent in 1979. *Id.* at 12a. The district court granted respondent's alternative request for a remittitur, reducing the jury's award to $360,000. *Id.* at 11a. Petitioner accepted the remittitur and respondent appealed. *Id.* at 12a.

4. The court of appeals reversed. Pet. App. 1a-37a. The court noted that the parties had assumed for purposes of appeal that petitioner's March 25, 1998, questionnaire was

a Title VII "charge" and that petitioner's July 1998 charge related back to that date. *Id.* at 15a. The court therefore concluded that the relevant Title VII inquiry was whether petitioner had established an unlawful employment practice in the 180-day period before petitioner filed her questionnaire on March 25, 1998, *i.e.*, "whether [petitioner] made out a claim for disparate treatment in pay based on conduct occurring after September 26, 1997." *Ibid.*

Relying on this Court's decision in *National Railroad Passenger Corp.* v. *Morgan*, 536 U.S. 101 (2002), the court of appeals held that petitioner was required to identify a discrete act or acts that occurred within the 180-day period, and that she was barred from challenging discrete acts of discrimination that had occurred before then. Pet. App. 16a-19a. The court held that there was at least one discrete act that petitioner could challenge—respondent's decision to deny her a pay raise in February 1998. *Id.* at 19a.

The court rejected petitioner's argument, based on *Bazemore* v. *Friday*, 478 U.S. 385 (1986), that she could challenge every one of the annual pay raise decisions in her 19-year career with respondent, on the theory that each one of those decisions affected the paychecks she received within the 180-day period. Pet. App. 20a-24a. The court concluded that permitting such a claim to proceed would make the timely-filing requirement "completely illusory," and contravene the central purposes of the timely-filing requirement: to foster prompt resolution of claims, and protect employers from having to defend against stale claims. *Id.* at 23a.

The court then stated that "at least in cases in which the employer has a system for periodically reviewing and re-establishing employee pay, an employee seeking to establish that his or her pay level was unlawfully depressed may look no further into the past than the last affirmative deci-

sion directly affecting the employee's pay immediately preceding the start of the limitations period." Pet. App. 24a. Following that approach, the court allowed petitioner to challenge only two pay raise decisions, the February 1998 pay decision and the last one that occurred before the 180-day period began. *Id.* at 27a-28a. Examining those decisions, the court concluded that no reasonable jury could have found that either decision reflected an intent to discriminate on the basis of sex. *Id.* at 31a-37a.

SUMMARY OF ARGUMENT

Under Title VII, an employee must file an EEOC charge within 180 or 300 days of when the unlawful employment practice occurred depending on whether the alleged practice occurred in a State that has its own agency regulating such practices. 42 U.S.C. 2000e-5(e)(1). Each pay decision is a discrete employment practice, and a discrete employment practice occurs on the day that the decision is made and communicated. Accordingly, an employee must challenge a pay decision within 180 or 300 days of the day that the particular pay decision was made and communicated or lose the ability to recover for it under Title VII.

An employee may not challenge paychecks received during the limitations period on the theory that they perpetuate the effects of discriminatory annual pay decisions that occurred outside the limitations period. The *Evans-Ricks-Lorance* line of decisions squarely forecloses that perpetuation-of-past-discrimination theory. Under those decisions, a plaintiff must identify an intentionally discriminatory act within the limitations period, not a discriminatory act outside the limitations period that has continuing consequences within it. The Court's most recent decision in this area, *National Railroad Passenger Corp.* v. *Morgan*, 536 U.S. 101 (2002), confirms that understanding.

Nothing in *Bazemore* v. *Friday*, 478 U.S. 385 (1986), compels a contrary result. Under that decision, a plaintiff may challenge paychecks within the limitations period when they are made pursuant to an ongoing intentionally discriminatory pay policy. But that is because such payments are themselves intentionally discriminatory, not because they perpetuate prior unchallenged acts of discrimination. An intentionally discriminatory pay policy "discriminates each time it is applied." *Lorance* v. *AT&T Techs., Inc.*, 490 U.S. 900, 912 n.5 (1989). Petitioner's effort to extrapolate support for her perpetuation theory from *Bazemore* cannot be squared with the language of *Bazemore*, the cases preceding *Bazemore*, or the Court's subsequent precedents.

Apart from its lack of grounding in this Court's decisions, the perpetuation theory would create an anomalous rule for pay decisions that has no textual anchor. The terms of Title VII do not distinguish pay decisions from any other kind of employment practice. Nor is there a functional basis for drawing such a distinction. The denial of an employee's desired pay raise cannot be meaningfully distinguished from the denial of a promotion. In both cases, the act can have long-term consequences for pay. Yet it is clear that an employee could not challenge a paycheck on the theory that it perpetuates the consequences of a promotion decision that occurred outside the limitations period. There is no basis for treating discrete pay decisions differently.

The perpetuation theory also contravenes the purposes of Title VII's limitations period. In particular, if accepted, it would reduce the incentive for employees to raise claims of discrimination promptly and require employers to litigate pay decisions that occurred years ago. This case illustrates those effects. Petitioner worked for respondent for approximately 19 years without challenging a single pay

decision. Yet, under petitioner's theory, she was free to challenge any pay decision made during that 19-year period simply by alleging that it had present effects. Neither Title VII, nor this Court's decisions interpreting it, permit that result. Because petitioner does not allege that the challenged pay was made pursuant to an intentionally discriminatory pay policy, but instead argues only that her pay perpetuated discrete intentional discriminatory pay decisions outside the statute of limitations, the court of appeals properly held that her claim is time-barred.

ARGUMENT

TITLE VII REQUIRES A PLAINTIFF ALLEGING INTENTIONAL PAY DISCRIMINATION TO ESTABLISH AN INTENTIONALLY DISCRIMINATORY PAY DECISION WITHIN THE STATUTORY LIMITATIONS PERIOD

Title VII makes it an "unlawful employment practice" for an employer "to discriminate against any individual with respect to his compensation * * * because of such individual's * * * sex." 42 U.S.C. 2000e-2(a)(1). Depending on whether a State has an administrative agency with authority to remedy unlawful practices covered by Title VII, a Title VII plaintiff must file a charge with the EEOC within either 180 or 300 days "after the alleged unlawful employment practice occurred." 42 U.S.C. 2000e-5(e)(1). Petitioner contends that a Title VII plaintiff alleging discrimination in pay can satisfy that requirement by showing that she received less pay than male employees in the same position within the applicable 180-day or 300-day period, even if the disparate pay is the result of discrete pay decisions that occurred outside that period. Under petitioner's theory, Title VII establishes no limit on how many years into the past a plaintiff may reach to find the pay raise decision

or decisions that caused her to receive less pay within the applicable limitations period.

This case illustrates the boundlessness of petitioner's theory. Petitioner worked for respondent for 19 years, but she did not file a charge of pay discrimination until the last year of her employment. Yet, under petitioner's theory, she was free to challenge as intentionally discriminatory every pay raise decision made during her 19-year career. As discussed below, neither Title VII nor the Court's precedents countenance that result. Under Title VII, an employee must challenge a pay decision within 180 or 300 days of its occurrence, and an employee may not circumvent that limitations period by challenging a paycheck received many years later on the theory that it perpetuates the effects of an unchallenged pay decision that occurred outside the limitations period.

A. An Employee May Not Circumvent Title VII's Limitations Period By Challenging A Paycheck On The Theory That It Perpetuates The Effects Of Prior Unchallenged Pay Decisions

1. In *National Railroad Passenger Corp.* v. *Morgan*, 536 U.S. 101, 110 (2002), the Court held that a "discrete" act occurs "on the day that it 'happened,'" and that a party therefore must file an EEOC charge within 180 or 300 days of that date or "lose the ability to recover for it." The Court identified as discrete acts refusals to hire, failures to promote, denials of transfers, and terminations. *Id.* at 114. In contrast, the Court in *Morgan* held that "[a] hostile environment claim is composed of a series of separate acts that collectively constitute one 'unlawful employment practice.'" *Id.* at 117. The Court therefore held that a hostile work environment claim is timely if the employee files a

charge "within 180 or 300 days of any act that is part of the hostile work environment." *Id.* at 118.

Like a refusal to hire, a failure to promote, or a termination, an annual pay raise decision is typically a discrete act, not a series of separate acts that together constitute an unlawful employment practice. Each time an employer denies a pay raise or sets a pay raise lower because of a person's sex, it constitutes a discrete "unlawful employment practice" because each such act "discriminate[s] against [that] individual with respect to his compensation * * * because of such individual's * * * sex." 42 U.S.C. 2000e-2(a)(1). Accordingly, as is true of other discrete acts that can have long term consequences with respect to pay or other benefits, such as a refusal to hire, a failure to promote, or a termination, a person must file a charge challenging a discrete pay raise decision within 180 or 300 days after the decision is made and communicated "or lose the ability to recover for it." *Morgan*, 536 U.S. at 110.

2. Petitioner seeks to circumvent that rule by claiming (Br. 21) that the delivery of paychecks itself constitutes an unlawful employment practice that occurred within the applicable period because that act perpetuated the effects of the past unchallenged pay raise decisions. That kind of perpetuation-of-past-discrimination claim, however, is directly foreclosed by the *"Evans-Ricks-Lorance"* line of precedents.

In *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977), an employee failed to file a timely charge to her termination. *Id.* at 554-555. After she was rehired, the employer used her rehiring date, rather than her original date of hire, to determine her seniority. *Id.* at 555. The employee challenged that practice on the theory that it perpetuated the effects of the discrimination that occurred when she was terminated on the basis of her sex. *Id.* at 556. While ac-

knowledging that the use of her rehiring date to determine her seniority would perpetuate a past act of allegedly unlawful intentional discrimination, the Court rejected the employee's claim. *Id.* at 557-558. The Court explained that the critical inquiry under Title VII is not whether there are continuing consequences of a past act, but whether "any present *violation* exists." *Id.* at 558. Because the employee had not alleged that the practice of using her rehiring date to measure seniority was itself an intentionally discriminatory act, she could not establish a violation of Title VII. *Ibid.*

In *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980), the college denied Ricks tenure and issued him a one-year contract after which his employment with the college would end. *Id.* at 252-253. Ricks failed to file a charge within 180 days of the denial of tenure, and instead filed a charge several months before his contract expired. *Id.* at 254-255. The Court rejected Ricks's claim that he could wait to challenge the tenure decision as intentionally discriminatory until it resulted in the loss of his job, explaining that "[t]he proper focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful." *Id.* at 258 (citation omitted). The Court also rejected Ricks's argument that he could challenge the termination itself on the theory that it perpetuated the effects of the past intentionally discriminatory denial of tenure. *Ibid.* The Court explained that, under *Evans*, "[t]he emphasis is not upon the effects of earlier employment decisions; rather, it is [upon] whether any present *violation* exists." *Ibid.* (citation and internal quotation marks omitted).

Likewise, in *Lorance* v. *AT&T Technologies, Inc.*, 490 U.S. 900 (1989), female employees challenged a change in the seniority system on the ground that it was intentionally

altered in order to protect incumbent males. They did not do so, however, until more than three years after the change was made. *Id.* at 905-906. The Court held that the employees could not resurrect their untimely challenge by claiming that an unlawful employment practice occurred not only when the seniority system was changed, but also each time its concrete effects were felt. *Id.* at 906. Relying on *Evans* and *Ricks*, the Court explained that a Title VII plaintiff may not assert a claim "that is wholly dependent on discriminatory conduct occurring well outside the period of limitations." *Id.* at 908.[1]

Evans, *Ricks*, and *Lorance* foreclose petitioner's perpetuation-of-past-discrimination theory. Under those decisions, "[i]t is simply insufficient" for petitioner to allege that the delivery of paychecks within the limitations period is unlawful because it "gives present effect" to past discriminatory pay raise decisions and therefore "perpetuates the consequences of forbidden discrimination." *Ricks*, 449 U.S. at 258 (citation and internal quotation marks omitted). Nor can petitioner escape the force of those decisions by describing the repeated distribution of paychecks as a "continuing violation." Pet. Br. 16-17 & n.9. Under the *Evans-Ricks-Lorance* line of cases, the distribution of a paycheck

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[1] In response to *Lorance*, Congress amended Title VII to provide that an "unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose * * * when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system." 42 U.S.C. 2000e-5(e)(2). Congress did not alter the timeliness requirement for any other employment practice. Accordingly, while *Lorance*'s specific holding on when a discriminatorily adopted *seniority system* must be challenged has been superseded by statute, its analysis of Title VII's timeliness requirement remains authoritative for other practices.

that is allegedly deflated as a result of discrete pay decisions that occurred outside the limitations is simply not a *violation* of Title VII. *A fortiori*, the repeated distribution of such paychecks cannot be a *continuing* violation.

B. An Employee May Challenge The Delivery Of A Paycheck As An Unlawful Employment Practice When It Is Made Pursuant To A Facially Discriminatory Policy

The fact that a paycheck that purportedly perpetuates intentional discrimination outside the limitations period does not satisfy the statute of limitations does not mean that a paycheck may never do so. A paycheck that is disseminated pursuant to a facially discriminatory pay policy itself constitutes an act of intentional discrimination and therefore is an "unlawful employment practice."

For example, every reduced payment that a woman receives pursuant to a policy that systematically requires a woman to be paid less than a man because of her sex is a separate act of intentional discrimination. That is true even when the facially discriminatory policy originates outside the limitations period. As long as the facially discriminatory policy is operative within the limitations period and it automatically requires a woman to receive less pay than a man because of her sex, each payment pursuant to the policy represents an intentional act of discrimination, and the victim of that policy may file a charge within 180 or 300 days of each such reduced paycheck.

There is a crucial difference, however, in the case of challenges to pay decisions made pursuant to such a discriminatory pay structure. Challenges to applications of a facially discriminatory policy do not depend on the theory that a practice is unlawful because it *perpetuates* a prior unchallenged discrete act. Rather, such challenges depend on the recognition that when a facially discriminatory policy

remains in effect, unlawful intentional discrimination is *presently occurring* with the delivery of each paycheck pursuant to the policy. See *Lorance*, 490 U.S. at 912 n.5.

In *Lorance*, the Court recognized this important distinction and held that an employee could challenge a facially discriminatory seniority system "at any time." 490 U.S. at 911. The Court explained that "a facially discriminatory system (*e.g.*, one that assigns men twice the seniority that women receive for the same amount of time served) by definition discriminates each time it is applied." *Id.* at 912 n.5. By contrast, with "a facially neutral system the discriminatory act occurs *only* at the time of adoption, for each application is nondiscriminatory (seniority accrues for men and women on an identical basis)." *Ibid.*

The same analysis applies to facially discriminatory pay systems. A facially discriminatory pay policy (*e.g.*, one that requires women to be paid at three-quarters of the rate for men in the same job category) "by definition discriminates each time it is applied." *Lorance*, 490 U.S. at 912 n.5. Because petitioner has not alleged, much less established, that respondent has a facially discriminatory pay policy, that theory of recovery is not available here.

C. An Employee May Likewise Challenge The Delivery Of A Paycheck As An Unlawful Employment Practice When It Is Made Pursuant To An Employer's Ongoing Intentionally Discriminatory Pay Structure

1. The same considerations that apply with respect to paychecks issued under a facially discriminatory pay system attach when an employer delivers the check pursuant to an ongoing but unwritten intentionally discriminatory pay structure. While they present different issues of proof, there is no functional difference between a written policy that requires all women to be paid at three-quarters of the

rate of men, and an unwritten policy that requires all women to be paid at three-quarters of the rate that men are paid. Like a facially discriminatory policy, such an ongoing policy of intentionally paying women less than men because of their sex "by definition discriminates each time it is applied." *Lorance*, 490 U.S. at 912 n.5.

Bazemore v. *Friday*, 478 U.S. 385 (1986), illustrates such an ongoing intentionally discriminatory pay structure. In that case, an Extension Service had a pre-Title VII policy of maintaining racially segregated branches and paying black employees less than white employees. *Id.* at 394. After Title VII was enacted, the Service merged the branches and eliminated some of the difference in pay between black and white employees. *Id.* at 394-395. But it admittedly continued to intentionally pay its black employees less than its-white employees doing the same job because of their race. *Ibid.* The court of appeals had concluded that there was no violation of Title VII because the policy of intentionally paying black employees less than white employees had originated prior to the enactment of Title VII. *Id.* at 395.

This Court found the court of appeals' error "too obvious to warrant extended discussion: that the Extension Service discriminated with respect to salaries *prior* to the time it was covered by Title VII does not excuse perpetuating that discrimination *after* the Extension Service became covered by Title VII." 478 U.S. at 395. The Court explained that "[a] pattern or practice that would have constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a violation upon Title VII's effective date, and to the extent an employer continued to engage in that act or practice, it is liable under that statute." *Ibid.* The Court added that when an employer continues to engage in such a policy of systematic

intentional discrimination, "[e]ach week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII." *Id.* at 395-396.

The lesson of *Bazemore* is that when an employer has an ongoing intentionally discriminatory pay structure, each paycheck delivered pursuant to that policy is a discrete wrong that may be separately challenged, regardless of whether the intentionally discriminatory policy began before Title VII was enacted or more than 180 or 300 days prior to the filing of a Title VII charge. Petitioner has not alleged that she received paychecks pursuant to such an ongoing intentionally discriminatory pay policy, and the record does not support the conclusion that such a policy existed. Instead, petitioner alleged only that she received reduced pay within the limitations period as a result of a series of discrete intentionally discriminatory pay raise decisions, all but one of which occurred outside the limitations period. *Bazemore* is therefore inapposite here.

2. Relying on the Court's statement that "[e]ach week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII," 478 U.S. at 395, petitioner seeks to extrapolate from *Bazemore* the far-reaching principle that an employer has an ongoing affirmative duty to rectify any discrete discriminatory pay decision, no matter how far in the past that discrete act occurred, and that any paycheck that perpetuates the effects of such past discriminatory acts is itself a new act of unlawful discrimination. Pet. Br. 21. For several reasons, that reading of *Bazemore* is unsustainable.

First, the Court in *Bazemore* did not suggest that it was breaking any new ground in the key passage of the opinion, much less departing from *Evans* or *Ricks*. To the contrary,

the Court viewed the principle it was stating as "too obvious to warrant extended discussion." 478 U.S. at 395. There is nothing "obvious" about the affirmative duty/perpetuation principle that petitioner seeks to extrapolate from *Bazemore*. To the contrary, if *Bazemore* had adopted that principle, it would have constituted a wholly unprecedented interpretation of Title VII, and would have been in substantial tension with the Court's prior decisions in *Evans* and *Ricks*. Such a decision clearly would have warranted "extended discussion." On the other hand, viewing *Bazemore* as holding only that an employer may not continue an intentionally discriminatory pay policy after Title VII was enacted simply because it began such a policy earlier is, as the Court stated, "too obvious to warrant extended discussion." *Ibid.*

Second, while the Court described the Service as having engaged in a practice of "perpetuating" discrimination, 478 U.S. at 395, it used that term to describe a practice of continuing a policy of intentionally discriminating on the basis of race, not simply failing to undo the effects of *past* discrimination. That is clear from the following key passage: "[a] pattern or practice that would have constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a violation upon Title VII's effective date, and to the extent an employer continued to engage in *that act or practice*, it is liable under that statute." *Ibid.* (emphasis added). The "pattern or practice" that would have violated Title VII but for the fact that it had not become effective was the pattern or practice of intentionally paying black employees less than white employees because of their race. Accordingly, when the Court referred to an employee's liability for the continuation of *"that act or practice,"* it necessarily meant continuation of the act or practice of intentionally paying black employees less than white

employees because of their race, not the act or practice of failing to undo the effects of prior discrimination.

Third, petitioner's reading of *Bazemore* would force that decision into conflict with the Court's earlier holdings in *Evans* and *Ricks*, and with its subsequent holding in *Lorance*, that a Title VII plaintiff may not seek recovery based on a theory that a practice is unlawful only because it perpetuates the effects of past discrete acts of discrimination that were not timely challenged. See pp. 10-12, *supra*. In contrast, limiting *Bazemore* to situations where an employer has an ongoing intentionally discriminatory pay structure fits hand in glove with those decisions.

Indeed, the Court in *Bazemore* reconciled its decision with *Evans* on precisely that basis. The Court explained that in *Evans*, the plaintiff alleged that the practice of giving her rehiring date seniority "gave present effect" to the past intentionally discriminatory act of terminating her "and thereby perpetuated the consequences of forbidden discrimination." *Bazemore*, 478 U.S. at 396-397 n.6. By contrast, the plaintiffs in *Bazemore* argued that "the present salary structure" was itself a "discriminatory pay structure." *Ibid.*[2] See *Morgan*, 536 U.S. at 112 (characterizing *Bazemore* as a "pattern-or-practice case" where there was an ongoing "discriminatory salary structure" that had begun prior to enactment of Title VII); *Shea* v. *Rice*, 409 F.3d 448, 456-457 (D.C. Cir. 2005); *id.* at 456-457 (Williams, J., concurring) (explaining that the key to determining whether a plaintiff may invoke *Bazemore* is whether she has established a "discriminatory salary structure").

Thus, *Bazemore* did not sanction a broad perpetuation theory for pay cases. Nor did it adopt the far-reaching pay-

[2] In its brief in *Bazemore*, the United States specifically argued that the salary structure at issue "remained intentionally discriminatory." Br. for Fed. Pet'rs, at 20 n.18, *Bazemore*, *supra* (No. 85-93).

check rule advanced by petitioner. Instead, it relied on a limited and obvious principle that has no application here.

D. Petitioner's Perpetuation Theory Creates An Anomalous Distinction Between Pay Claims And Other Claims, Most Obviously Denial Of Promotion Claims

Petitioner's perpetuation theory not only has no footing in this Court's decisions, but it also would create a rule for pay cases that is different from the rule that would apply to any other kind of Title VII case. Indeed, petitioner nowhere suggests that her perpetuation theory would apply to any employment practice other than pay. The text of Title VII, however, draws no distinction between a challenge to a pay practice and a challenge to any other kind of employment practice. See 42 U.S.C. 2000e-2(a)(1) (making it an "unlawful employment practice" for an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment"). As petitioner notes, a pay decision can have pay consequences years into the future. But so too can a failure to hire, a failure to promote, a layoff, a denial of tenure, and a termination. Yet, each of those is a discrete act that must be challenged within 180 or 300 days of its occurrence or the plaintiff loses the right to challenge it. See *Morgan*, 536 U.S. at 114-115; *Ricks*, 449 U.S. at 258.

A discrete pay decision, such as the denial of an annual raise or a decision to set an employee's annual raise at 2% rather than 5% of her base salary, is particularly difficult to distinguish in principle from a failure to promote. A promotion is ordinarily, if not invariably, accompanied by a pay increase, often a greater increase than would be available for any in-grade adjustment of pay. Indeed, in many cases, that is the principal reason that an employee desires the

promotion. When an employee fails to obtain the promotion and the accompanying pay raise, that can have lasting consequences on pay that are indistinguishable from the denial of an annual pay raise. Yet, an employee cannot challenge the delivery of a paycheck years later on the theory that the reduced pay perpetuates the consequences of the prior discriminatory failure to promote. *Morgan*, 536 U.S. at 114-115. There is no apparent reason why Congress would have wished to treat discrete in-grade pay decisions differently from promotion or other decisions affecting benefits. And there is nothing in the text of Title VII that would permit such a distinction to be drawn.

E. Petitioner's Perpetuation Theory Thwarts The Achievement Of The Purposes Of The Limitations Period

Petitioner's perpetuation-of-past-discrimination theory is also fundamentally at odds with the important purposes of the limitations period. Title VII's limitations period serves two principal purposes. First, "[b]y choosing what are obviously quite short deadlines, Congress clearly intended to encourage the prompt processing of all charges of employment discrimination." *Morgan*, 536 U.S. at 109 (citation omitted). Second, Congress sought to "protect employers from the burden of defending claims arising from employment decisions that are long past." *Ricks*, 449 U.S. at 256-257.

Petitioner's perpetuation theory undercuts both of those purposes. By allowing an employee to challenge pay raise decisions years later, petitioner's theory removes a significant part of the incentive for an employee to promptly challenge pay raise decisions that are thought to be discriminatory. Furthermore, accepting petitioner's theory would mean that a plaintiff could force an employer to defend a series of pay decisions made by managers years ago. In-

deed, petitioner in this very case put respondent in the position of having to defend pay decisions going back 19 years. There is no evidence that Congress intended to impose such an extraordinary and impractical record-keeping burden on employers, much less with the burden of having to sift through any evidence that may be available with respect to pay decisions made years or even decades earlier in order to adjudicate pay claims.

Petitioner contends (Br. 29) that employees retain an incentive to file early in order to avoid the potential loss of extra backpay, the loss of evidence to prove a case, and the possibility of a laches defense. But none of those potential incentives is a substitute for the clear guidance provided by a statute of limitations. Indeed, it is particularly odd to point to the possibility of a laches defense as a basis to avoid the most natural reading of a *statute* of limitations. Nor will any of the potential incentives eliminate an employee's ability to wait and see what happens over a number of years with the prospect of being able to challenge every single pay decision whenever suit is brought. Indeed, petitioner views it as a virtue of her proposal that employees will be able to do just that. Br. 25-26. The crucial point, however, is that regardless of the extent to which the factors cited by petitioner afford an incentive to file early, they do not provide anything approaching the incentive that comes from applying the usual rule that a plaintiff who fails to challenge an employment practice within 180 or 300 days of its occurrence forever loses the right to complain about that practice.

Petitioner also argues (Br. 28) that employers can adequately protect themselves by saving their employment records and by asserting a laches defense when a plaintiff unreasonably delays and the delay prejudices the employer's defense. But Title VII's short limitations period is

intended to eliminate stale claims, not just ensure that employers will not be prejudiced in the their ability to defend themselves against stale charges of discrimination. The statute of limitations is intended to allow an employer to regard a past act as having no further potential legal consequence, *Evans*, 431 U.S. at 558, and to enable an employer to avoid the costs, burdens, and risks associated with litigation over that past act, including the burden of having to litigate a fact-bound laches defense which may not lend itself to disposition at the summary judgment stage, given the intensely factual nature of a laches defense. *Ricks*, 449 U.S. at 256-267. Those purposes would be thwarted if petitioner's perpetuation theory were adopted.

F. Petitioner's Remaining Arguments Are Unpersuasive

Petitioner raises a number of other arguments in support of her position. None is persuasive.

1. Petitioner's contention that a violation of the Act occurs only when an employee receives disparate pay is incorrect

Petitioner argues (Br. 22-23) that an intentionally discriminatory pay decision is not an unlawful employment practice when it first occurs because only the delivery of unequal pay can constitute discrimination "with respect to * * * compensation." 42 U.S.C. 2000e-2(a)(1). That argument is without merit. When an employer denies a pay raise or sets a pay raise at 2% rather 5% based on an individual's sex, that employer plainly discriminates "with respect to * * * compensation." *Ibid.* An employee may not experience the most acute effects of that unlawful employment practice until she receives unequal pay. But under Title VII, a discrete unlawful employment practice occurs when a discriminatory employment decision has been "made and communicated," not when the actual effects of

that discriminatory act are most concretely experienced. *Ricks*, 449 U.S. at 258. That does not create any anomaly when it comes to enforcement. If an employee has not received any pay under the pay decision at issue, she may seek an injunction against the unlawful practice, but simply would not be entitled to backpay.

2. Petitioner's policy arguments do not justify extending the limitations period for challenges to disparate pay decisions

Petitioner argues (Br. 26-28) that application of the ordinary 180- or 300-day limitations period for discrete acts would have an adverse effect in pay cases because employees will ordinarily have little reason to suspect discrimination within the applicable period. But there is no reason to assume that employees will be less sensitive to *pay* decisions than other decisions involving such matters as promotions or benefits. Indeed, there is some reason to suspect that employees will be particularly vigilant concerning the bottom line of take-home pay. Furthermore, if an employer has actually discriminated in pay, other red flags may be raised during the limitations period, whether it is a performance ranking that does not accurately reflect the employee's performance (Pet. Br. 5), unequal treatment in assignments, on-the-job harassment, a supervisor's threat not to give a good performance rating unless the employee submits to his sexual advances (*ibid.*), a supervisor's statement that it is easier to downgrade females than males (*id.* at 6), or statements from other female employees that they are experiencing discrimination (*id.* at 7-8).

Petitioner also worries (Br. 25-26) that employees may refrain from challenging pay decisions immediately because the impact of any one decision may seem minor in comparison to the cost of alienating the employer. But few employ-

ees are likely to regard the denial of a raise, or a 2% rather than a 5% raise, as a trivial event. And there is no reason to conclude that employees are incapable of appreciating the possible long-term consequences of such a pay decision, as opposed to other decisions that may have long-term consequences, like the denial of a promotion or benefits. Moreover, even if petitioner were correct in characterizing an ingrade pay denial as relatively trivial, that is not obviously a factor that counts in favor of more favorable treatment for limitations purposes, than more dramatic action like a failure to promote.

In any event, the two concerns raised by petitioner are not unique to pay cases. As for the first concern, an employee may see little hard evidence of discrimination when an employer hires her for one job, but rejects her for another higher-paying one, or when an employer fails to promote her at the first opportunity. As for the second concern, many employees might conclude that challenging such hiring and promotion decisions as acts of discrimination so early in their tenure would not be worth the possible cost to their careers. Yet Congress has concluded that those concerns are outweighed by the desirability of encouraging prompt resolution of discrimination complaints and of protecting employers from the burdens and disruptions of litigation once 180 or 300 days have passed. That congressional judgment applies equally to pay cases.

3. Petitioner's reliance on lower court decisions, the EEOC's guidance, and Congress's amendment for seniority systems is misplaced

Petitioner contends (Br. 29-32) that the Court should defer to the appellate courts that have adopted her perpetuation theory for pay cases. But this Court of course does not defer to the legal analysis of the lower courts, and that

is particularly true when, as here, a key step in the analysis is the proper interpretation of one of this Court's precedents (*i.e., Bazemore*). The lower court decisions that support petitioner's position turn on an improper reading of *Bazemore* for the reasons discussed above.

In any event, some courts have correctly recognized that an employee may not challenge the delivery of paychecks on the theory that they continue the effects of past discrete pay decisions outside the limitations period and that *Bazemore* is limited to challenges to ongoing discriminatory pay structures. See, *e.g.*, *Shea* v. *Rice*, 409 F.3d 448, 453-454 (D.C. Cir. 2005) (An employee may challenge "a persistent discriminatory salary structure," but may not "attempt to breathe new life into discriminatory acts that occurred outside the limitations period * * * by relying on their lingering effects in the present."); *Dasgupta* v. *University of Wisconsin Bd. of Regents*, 121 F.3d 1138, 1140 (7th Cir. 1997) ("[A]n untimely Title VII suit cannot be revived by pointing to effects within the limitations period of unlawful acts that occurred earlier," because "[t]hat would make employers pay compensation for violations that were no longer actionable and would thus unravel the statute of limitations.").

Like the courts of appeals that have endorsed petitioner's theory, the EEOC's support for that theory also rests on a misreading of *Bazemore*. See United States Equal Employment Opportunity Comm'n, *Compliance Manual*, Section 2-IV.C & n.183 (July 2005). Accordingly, it lacks persuasive force and is not entitled to deference. *Morgan*, 536 U.S. at 110 n.6.

For the same reason, Congress's enactment of legislation that altered the timely-filing requirement for seniority systems, but not for other employment practices, does not assist petitioner. As petitioner argues (Br. 38-39), that leg-

islation left *Bazemore* intact. But as discussed above, *Bazemore* does not support petitioner's perpetuation theory. And just as the legislation left *Bazemore* intact, it also left *Evans* and *Ricks* intact, and petitioner's perpetuation theory is inconsistent with those decisions. What was not left intact, of course, was the prospective significance of the *Lorance* decision, but beyond that the legislation left the Court's precedents untouched. Certainly, nothing in the Senate Report cited by petitioner (Br. 39) can alter this Court's precedents.

4. The law governing limitations periods in other contexts does not support petitioner's claim

Finally, petitioner seeks to rely (Br. 34-38) on interpretations of statutes of limitations in other contexts to support her view that a new limitations period springs to life each time an employee receives unequal pay as a result of prior unchallenged acts of discrimination. But those examples show only that when violations repeat themselves, each violation triggers a new limitations period. That principle is not applicable here because the distribution of unequal pay that is the result of prior unchallenged pay decisions is not a violation of Title VII.

a. As petitioner notes (Br. 34-35), under the Equal Pay Act of 1963, each paycheck that delivers less pay to a female employee than a male employee performing the same work is a separate violation of the Act, giving rise to a new cause of action and a new limitations period. See *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 208 (1974). But that is because the text of the Act explicitly defines the unlawful employment practice as the employer's act of "paying wages to employees * * * at a rate less than the rate at which he pays wages to employees of the opposite sex * * * for equal work." 29 U.S.C. 206(d)(1). Under the

terms of that statutory prohibition, each time the employer "pay[s] wages" at a lower rate for the same work, there is a violation of the Act, without regard to when the disparity originated or whether such a payment is an act of intentional discrimination. And since each such reduced payment constitutes a violation, each such payment triggers a new limitations period.

By contrast, as already discussed, the payment of unequal wages that is the result of prior unchallenged pay decisions is not a violation of Title VII. Under Title VII, the occurrence of that payment therefore does not trigger a new limitations period.[3]

b. Petitioner's other recurring violation examples are inapposite for the same reason. Under the Fair Labor Standards Act of 1938, a violation occurs, and a new limitations period therefore arises, each time an employer fails to "pay" a minimum wage for the hours worked, 29 U.S.C. 206(a), and each time an employee fails to "receive[] [overtime] compensation." 29 U.S.C. 207(a)(1). Similarly, in the case of an installment obligation, each time a payment that is due is not made on time, it constitutes a breach of the obligation. Accordingly, in such cases,"'a new cause of action,' carrying its own limitations period, 'arises from the date each payment is missed.'" *Bay Area Laundry & Dry Cleaning Pension Trust Fund* v. *Ferbar Corp. of California, Inc.*, 522 U.S. 192, 208 (1997) (citation omitted). Likewise, because each sale that is made pursuant to an ongoing agreement to fix prices is itself a violation of the antitrust laws, each such sale starts a new statute of limitations. See *Klehr* v. *A. O. Smith Corp.*, 521 U.S. 179, 189 (1997).

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[3] Petitioner originally brought an Equal Pay Act claim against respondent, but that was "abandoned or dismissed" before trial and is not before this Court. Pet. App. 10a n.7.

The difference between those cases and this one is that the act that petitioner relies on to trigger the new limitations period—the dissemination of a paycheck that allegedly is infected by prior unchallenged pay decisions—is itself not a violation of the statute at issue. Its occurrence therefore cannot trigger a new limitations period.

c. Petitioner also seeks to rely (Br. 36-37) on precedent under the National Labor Relations Act. As discussed above, differences among statutes limit the value of such comparisons, but this Court's interpretation of that Act undermines rather than supports petitioner's statute of limitations argument. In *Local Lodge No. 1424, Int'l Ass'n of Machinists* v. *NLRB*, 362 U.S. 411 (1960), an employer and a union agreed to a clause in a collective bargaining agreement that required employees to join the union within 45 days of the clause's execution. Under NLRB precedents, agreeing to the clause and applying the clause both constituted an unfair labor practice. A complaint was issued that was untimely as a challenge to the agreement, but timely as a challenge to an application of the agreement. The Court held that the challenge could not proceed because it would have the effect of "reviving a legally defunct unfair labor practice." *Id.* at 417. See *Lorance*, 490 U.S. at 910-912 (discussing *Machinsts*).

Petitioner's Title VII theory shares the same defect. Allowing petitioner to challenge the pay she received within the limitations period based on the theory that it is the result of discrete pay raise decisions that occurred outside the limitations period would effectively allow petitioner to "reviv[e] a legally defunct" challenge to pay raise decisions made more than a decade ago.

G. The Judgment Of The Court Of Appeals Should Be Affirmed

Although the court of appeals correctly held that petitioner's Title VII claim was time-barred, it left open the possibility that an employer could reach outside the limitations period back to "the last affirmative decision directly affecting the employee's pay immediately preceding the start of the limitations period." Pet. App. 24a. The Court should rule out that possibility and make clear that an employee must point to a discrete act of discrimination within the limitations period.

For the reasons discussed above, the principle that governs this case is that an employee may not seek to prove a Title VII violation based on the theory that pay received within the limitations period is the result of discrete pay decisions that occurred outside the limitations period. It makes no difference whether the discrete pay decision occurred 20 years ago or is the last pay decision that occurred before the commencement of the limitations period. Similarly, it makes no difference whether the employer reevaluates salary decisions periodically or gives increases where no such reevaluation occurs. The court of appeals' judgment should therefore be affirmed on the ground that Title VII does not authorize the kind of perpetuation-of-past-discrimination claim that petitioner asserts.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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